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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 324

W. GEORGE KENNEDY, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD BENNETT WILLIAMS
VINCENT J. FULLER
1000 Hill Building
Washington, D. C.

W. SANDERS GRAMLING
1715 Biscayne Boulevard
Miami 32, Florida

J. EDWARD WORTON
518 Pan American Bank Building
Miami 32, Florida

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No.

W. GEORGE KENNEDY, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, W. George Kennedy, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed the order of the United States District Court for the Southern District of Florida dismissing all counts of a twenty-one count indictment in which petitioner was a named defendant in ten counts.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida has not been reported

(App. 1a).[1] The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 266 F.2d 747 (App. 3a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1959 (App. 3a). A petition for rehearing was denied on July 20, 1959 (R. 380). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals had jurisdiction to entertain an appeal from that part of the district court's order which dismissed count one of the indictment on the ground that the facts stated therein did not allege a conspiracy to misapply moneys, funds, and credits of banking institutions in violation of 18 U.S.C. §§ 656 and 657, but at most suggested maladministration.

2. Whether approval of loans based on adequate security, encumbered by prior unrecorded mortgages, constitutes a wilful misapplication of bank funds under 18 U.S.C. § 657 when under local law priority of recording determines priority of lien.

3. Whether the participation provisions of 18 U.S.C. § 1006 render unlawful the approval of loans by officers of federal savings and loan associations to persons conducting business with corporations in which those officers hold stock.

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[1] Citations to the record and appendices in this case have been abbreviated as follows:

Transcript of Record in Court of Appeals—R.
Appendix to Petition for Writ of Certiorari—App.

4. Whether an indictment charging a conspiracy to violate 18 U.S.C. §§ 656, 657 and 1006 adequately states an offense where there are no averments demonstrating the unlawfulness of the alleged misapplications, or the manner or unlawfulness of the alleged indirect participations, and where the alleged false statements were made to an agency of the United States not encompassed by § 1006.

STATUTES INVOLVED

18 U.S.C. § 656

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> * * * *

18 U.S.C. § 657

> Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit

Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 1006

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States, with intent to defraud any such institution or any other

company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 695.01, Florida Statutes 1957

No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of one year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

* * * *

STATEMENT

Petitioner and three others, Baron deHirsch Meyer, Leonard Abess and Sam R. Becker, were variously named as defendants in a twenty-one count indictment returned in the United States District Court for the Southern District of Florida in February 1958 (R. 1). Count one of this indictment alleges a conspiracy by all defendants to violate 18 U.S.C. §§ 656, 657 and 1006 through the making of various loans and the execution of financial reports. Of the remaining counts, petitioner is named as defendant in nine—those charging substantive offenses under 18 U.S.C. §§ 657 and 1006. On petitioner's and his codefendants' motion, the district court dismissed count one of the indictment for its failure to state an offense, and the remaining counts for duplicity.

The conspiracy count, count one, charges that the defendants, as officers and or directors of various national banks and or savings and loan associations, did conspire to misapply moneys, funds and credits of those institutions by the execution of various loan transactions whereby the moneys, funds and credits would be withdrawn from and lost to the institutions in violation of 18 U.S.C. §§ 656 and 657 (R. 7, 9; App. 4a, 6a). It was a further stated objective of the alleged conspiracy to violate that provision of 18 U.S.C. § 1006 proscribing the making of a false entry in any book, record or statement by an officer of a savings and loan association (R. 7, 10; App. 5a, 7a). Finally, it was stated to be a purpose of the alleged conspiracy to violate that provision of 18 U.S.C. § 1006 prohibiting an officer of a savings and loan association from indirectly participating in, sharing in, or receiving any money, profit, property or benefits

through any transaction, loan or contract of such association with intent to defraud the association or the United States (R. 7, 10; App. 5a, 7a).

Petitioner is next named in counts thirteen through seventeen, all of which allege violations of 18 U.S.C. § 657, which makes it a crime for an officer of a federal savings and loan association to misapply funds of such association, wilfully and with intent to defraud. Count thirteen alleges that petitioner and his three codefendants wilfully misapplied and caused to be misapplied moneys, funds and credits of the Miami Beach Federal Savings and Loan Association in that "the defendants herein did approve a construction loan to Audubon Homes, Inc., in the amount of $547,000 on the security of certain real estate, the defendants then and there well knowing that there was in existence a prior purchase money mortgage on said real estate . . ." (R. 36; App. 20a). It is further alleged that the existence of the prior purchase money mortgage was not disclosed to the association, and that consequently the security of the association on its loan was inferior to the prior mortgage. Since there is no allegation of the recording of the prior mortgage, it is unexplained how the prior mortgage acquired its priority. Counts thirteen through seventeen are identical in all respects, excepting the amounts of the loans involved.

Counts eighteen through twenty-one (R. 45-48; App. 22a), charge four defendants, including petitioner, with indirectly participating or sharing in certain moneys and profits through loan transactions of the Miami Beach Federal Savings and Loan Association with intent to defraud the Association, in violation of 18 U.S.C. § 1006. These counts are

substantially identical, varying only with respect to the amount involved and the identity of the borrower. The manner in which petitioner allegedly participated in these loan transactions is not alleged, nor are any facts demonstrating that the participations were unlawful.

Petitioner and his codefendants moved *inter alia* to dismiss the several counts of the indictment, on the ground that insufficient facts were alleged in any count to set forth a criminal offense (R. 48). The district court dismissed the indictment in its entirety: count one on the ground that the acts alleged did not amount to criminal misapplications, and the remaining counts on the ground that they were duplicitous (R. 110; App. 1a).

On appeal to the United States Court of Appeals for the Fifth Circuit, the order of the district court was reversed, 266 F.2d 747 (App. 3a). The propriety of the government's appeal to the court of appeals was questioned on the ground that it had no jurisdiction to entertain an appeal from the dismissal of the conspiracy count. It was asserted that under the Criminal Appeals Act, 18 U.S.C. § 3731, only this Court had jurisdiction to entertain the appeal, for the district court's dismissal of count one was predicated on the construction of the statutes on which that count of the indictment was founded. As to the substantive counts no question was raised concerning the court of appeals' jurisdiction. That court reversed the dismissal of these counts, concluding they were not duplicitous; and considering petitioner's further argument that counts thirteen through twenty-one did not sufficiently state offenses, the court of appeals, one judge dissenting in part,

determined that the counts adequately charged offenses under 18 U.S.C. §§ 657 and 1006.

REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue to review the exercise of jurisdiction by the court of appeals over so much of the district court's order as dismissed count one of the indictment. Since the stated basis for this dismissal was a construction of the statutes on which the count was founded, the appeal from the dismissal should have been to this Court under the Criminal Appeals Act, 18 U.S.C. § 3731. The court below erroneously exercised its appellate jurisdiction, in apparent conflict with the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Mersky*, 261 F.2d 40, *jurisdiction postponed*, 359 U.S. 951.

In holding an indictment under 18 U.S.C. § 657 sufficient where no element of loss appears on the face of the indictment, the court below has departed from the rule enunciated by this Court in *United States* v. *Britton*, 107 U.S. 655. In holding that an indictment for violation of 18 U.S.C. § 1006 need not allege the manner of an alleged unlawful participation, or facts demonstrating it to be unlawful, the court below has decided, in a case of first impression, a question of federal law in a way contrary to the standards observed in indictments under companion statutes. A fourth important question of federal criminal procedure is presented by the court of appeals' decision upholding a conspiracy charge where the purposes of the alleged conspiracy are not fully and clearly stated. These issues call for the exercise of this Court's supervisory power over the administration of justice in the lower federal courts.

1. The Criminal Appeals Act, 18 U.S.C. § 3731, has been the subject of frequent consideration both in this Court and in the various courts of appeals. Particularly where a dismissal of an indictment is based upon the construction of the statute on which it is founded, it is difficult to determine whether an appeal should be directed to this Court or the court of appeals. Cf. *United States* v. *Mersky*, 261 F.2d 40, *jurisdiction postponed*, 359 U.S. 951; *United States* v. *Philpburs*, 316 U.S. 1.

The district court in dismissing count one of this indictment concluded that the grand jury had assumed that use or disposition of funds of a national bank in a manner proscribed by the Federal Reserve Act, and more particularly 12 U.S.C. §§ 371 and 371(*c*), constituted a criminal misapplication. The district court, determining that these sections themselves created no offense against the United States, dismissed this count on the ground that the alleged acts of the defendants in violation of provisions of the Federal Reserve Act did not amount to criminal misapplications. It is readily apparent that the district court dismissed this count not on the basis of a mere defect in pleading but on the ground that the acts alleged failed to fall within the purview of a statute on which the count was based, *viz.*, 18 U.S.C. §§ 656 and 657. It further would appear that the district court found the allegations of a conspiracy to violate 18 U.S.C. § 1006 wholly insufficient.

This Court in *United States* v. *Borden Co.*, 308 U.S. 188, stated the principles governing direct appeals under the Criminal Appeals Act. It was there stated:

> "When the District Court holds that the indictment, not merely because of some deficiency in

pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute. . . ." 308 U.S. at 193.

The instant case falls within this category since it is clear that the district court believed that the substance of the charge was defective. The facts set forth did not amount to a criminal misapplication.

The statement of the court below that "An appeal to the Supreme Court is not needed to have repeated this long-settled construction of the term 'wilfully misapplies'" is no answer. The need is not to have this Court repeat the rule of the *Britton* case, 107 U.S. 655. The point is this: The district court construed the allegations of count one as alleging a conspiracy to violate the Federal Banking laws, 12 U.S.C. 371, and then determined that the doing of acts proscribed by those laws did not constitute criminal misapplications under 18 U.S.C. §§ 656 or 657.

In the *Mersky* case, *supra*, the district court dismissed an indictment that alleged the improper labeling of goods imported from East Germany. The dismissal was predicated on the construction of a regulation which the court found did not render illegal the acts of defendant and which was invalid for vagueness, in any event. The Court of Appeals for the Second Circuit declined to entertain an appeal from the order of dismissal and certified the case to this Court for further consideration. 261 F.2d 40, 44, *jurisdiction postponed*, 359 U.S. 951. That court recognized the district court's dismissal as being predicated upon the construction of a statute and not

upon the construction of the indictment. The same situation is presented here.

Criminal appeals by the government are not favored, and the statutes authorizing them have been narrowly construed. The court below, however, has usurped the appellate jurisdiction of this Court in resolving the issue there presented by the conclusion that review by this Court was not "needed."

2. Counts thirteen through seventeen of the indictment present a novel question of federal law not previously resolved: Whether an indictment charging a violation of 18 U.S.C. § 657 adequately describes an offense where the alleged misapplication takes the form of a loan given by a federal savings and loan association on the basis of security encumbered by a prior unrecorded mortgage.

Admittedly, under Florida law a prior mortgage enjoys no priority unless it is recorded. Section 695.01 Florida Statutes (1957). Furthermore, as it is alleged in these counts that the prior mortgages were not disclosed to the Miami Beach Federal Savings and Loan Association, it must be presumed that they were not recorded, for, if they were, the Association would have had notice of the prior mortgages. As unrecorded mortgages enjoy no priority under Florida law, that lien of the Association was not an inferior lien as alleged. While this was recognized by one member of the court below as rendering these five counts deficient, a majority found this not to be so. Such a conclusion can be predicated only on a refusal to recognize the law of Florida as controlling the question of priority of liens. In the absence of a federal statute regulating the priority of liens the law

of Florida must prevail. Cf. 28 U.S.C. § 1652; *Erie Ry. Co.* v. *Tompkins*, 304 U.S. 64.

There can be no violation of § 657 unless there exists a conversion of funds and a consequent loss. *United States* v. *Britton, supra; Evans* v. *United States*, 153 U.S. 584. In the counts here in issue, neither of these elements is present, for it appears on the face of the indictment that the security for the loans approved was adequate security: The loans did not exceed the amount warranted by the security.

Even beyond this, these counts fail to state unequivocally that the loans were executed transactions. In each of counts thirteen through seventeen it is alleged that the defendants did "approve" a construction loan. It is not averred that the loan was executed. Without this element no charge of wilful misapplication is valid. *Batchelor* v. *United States*, 156 U.S. 426; *Johnson* v. *United States*, 95 F.2d 813. Comparison of these five counts with counts two through ten is helpful here. In the latter group it is averred that the defendants "caused" the several lending institutions "to" make a loan and extend credit." No comparable allegations appear in counts thirteen through seventeen.

The court of appeals then has decided a question of federal law in a manner contrary to applicable decisions of this Court. The *Britton*, *Batchelor* and *Evans* cases all contemplate the elements of conversion and loss, and neither of these is to be found in counts thirteen through seventeen.

3. Counts eighteen through twenty-one charge petitioner and three others with indirectly participating in, sharing in and receiving money, profits and

benefits in the name of "Federal Title and Insurance Corporation" through loans from the Miami Beach Federal Savings and Loan Association to various named borrowers, with intent to defraud the Association. While it is alleged in these counts that petitioner is a stockholder in Federal Title and Insurance Corporation, the relationship between Federal Title and the several borrowers is not alleged, nor are the means through which the participations were accomplished. It nowhere appears whether fees were paid to Federal Title by the borrowers to compensate it for assisting in obtaining a loan, whether Federal Title borrowed this money, or whether this money was paid to Federal Title in repayment of a loan from it.

An important question of federal law apparently not heretofore considered by this Court is here presented. By the construction of the court below, no officer, agent or employee of an institution named in § 1006 may make a loan to a company or firm that does business with or pays money to another company in which that officer, agent or employee has any interest —irrespective of the size of that interest. Such a loan can henceforth be made only at the peril of that person authorizing it. In the absence of a clear expression of legislative intent, the Congress cannot be presumed to have swept with such a broad brush. Moreover in light of the history of § 1006 there is a substantial question whether Congress intended this unlawful participation provision to relate to federal savings and loan associations. This section was derived from some eleven sections of the 1940 code, each of which proscribed the embezzlement and wilful misapplication of funds of various institutions. Four of these sections also proscribed the participation in loan

transactions by officers or agents of the various named institutions, not including federal savings and loan associations. Section 1467(c) of Title 12, which related to these associations, referred to embezzlements, misapplications and false entries, but made no mention of unlawful participations.

In view of the Reviser's comment, that revised § 1006 "condenses and simplifies the constituent provisions without change of substance except as herein indicated," it appears certain that Congress never intended to render unlawful conduct which previously was not. Certainly the Reviser's notes indicate that no such change was intended. A similar situation presented to this Court in *Fourco Glass Co.* v. *Transmirra Prod. Corp.*, 353 U.S. 222, was resolved as petitioner submits this question relating to § 1006 should be.

Furthermore an indictment charging unlawful participations must allege facts showing the nature of the scheme by which the indirect participations were accomplished and facts demonstrating it to be unlawful. To "participate indirectly" has no more legal significance than "wilfully misapplies" as that term is employed in 18 U.S.C. §§ 656 and 657. It is undisputed that, in an indictment under either of these last sections, the manner of the alleged misapplication and facts demonstrating its unlawfulness must be alleged. The last element is satisfied by averments that certain funds were converted and that the credit institution sustained a loss by virtue of the transaction. *United States* v. *Britton*, 107 U.S. 655; *Evans* v. *United States*, 153 U.S. 584; *Batchelor* v. *United States*, 156 U.S. 426; *United States* v. *Matsinger*, 191 F.2d 1014. Similarly, where there is

no loss or detriment sustained by the credit institution, a participation is not unlawful.

4. Considering count one on its merits, it is submitted that review of the court of appeals decision on this count is essential to the proper administration of the federal criminal laws. This prolix count charging a conspiracy on the part of all defendants to violate 18 U.S.C. §§ 656, 657 and 1006, wholly fails to comply with Rule 7(c) of the Federal Rules of Criminal Procedure which requires a plain, concise and definite statement of essential facts.

Except for a recitation in the language of §§ 656 and 657 of Title 18 (R. 7; App. 4a; 5a), there appears to be no attempt to allege as an objective of the alleged conspiracy the violation of those sections. Since this Court's decision in *United States* v. *Britton*, 108 U.S. 192, it has been insufficient to aver only the language of the statute in an indictment for conspiracy to misapply funds. Other paragraphs in count one (R. 8-10; App. 4a) all appear to allege activities violative of federal banking laws, specifically 12 U.S.C. §§ 371(c) and 375, but these nowhere appear to be associated with §§ 656 or 657 of Title 18. The government admitted in the court below that violation of these provisions of the banking laws constitutes no criminal offense. Hence there can be no criminal conspiracy to violate them.

It is also alleged that certain loans were allowed and permitted by defendants, with the intent to defraud, and that funds of the lending institution were lost for the use of the lending institution (R. 9, 10). There are no allegations that these loans were without interest, and it appears that the funds were actually being used by the lending institutions con-

trary to the conclusion expressed. For a credit institution to lend money at interest is for that institution to use that money.

The remaining allegations of unlawful conspiratorial objectives are also insufficient, as the district court apparently found. The attempt is to allege a conspiracy to violate the false entry and the participation provisions of 18 U.S.C. § 1006. The latter charge suffers from the same deficiencies as are present in these counts alleging substantive offenses of unlawful participation, counts eighteen through twenty-one.

A remaining objective of the alleged conspiracy is the violation of that provision of 18 U.S.C. § 1006, proscribing the making of false entries by an officer or agent of certain banking institutions. It is alleged (R. 11, 12) that defendants, with intent to deceive agents of the Home Loan Bank Board, did fail to disclose certain of their activities when asked of their relationships to any loan transactions of the Miami Beach Federal Savings and Loan Association.

The false entry provision of § 1006 falls into two categories: first it is an offense to make false entries with an intent *to defraud* certain named institutions, not including the Home Loan Bank Board; and second it is an offense for an officer, agent or employee of the named institutions "*to deceive* any officer, auditor, examiner, or agent *of any such institution or of department, or agency* of the United States," by making any false entry in any books or records of such institution.

Insofar as the second category is concerned, the gravamen of the offense is *to deceive* an officer, auditor, examiner or agency of certain named institutions, "*or of department* or agency of the United

States." This last phrase is patently ambiguous, and as such this must be resolved in favor of lenity. *Bell v. United States*, 349 U.S. 81. The only construction consistent with this principle is to read the phrase "of department or agency" as "of any such department or agency." So construed the reference is again to the named institutions in § 1006, and as Home Loan Bank Board is not named as one of those institutions, neither petitioner nor his codefendants could conspire to deceive the Board in violation of § 1006.

The district court predicated its order of dismissal of count one upon a construction of §§ 656 and 657 of Title 18, and it also appears that that court also deemed the allegations of a conspiracy to violate § 1006 insufficient. *Compare United States v. Malphurs*, 316 U.S. 1. The construction of several statutes being in issue, the appeal from the district court should have been to this Court in the first instance. Beyond this, however, the decision of the court of appeals as to count one should be reviewed by this Court as that decision constitutes a departure from the standard observed in the federal courts since the decisions in *United States v. Britton*, 107 U.S. 655 and 108 U.S. 192.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS
VINCENT J. FULLER
W. SANDERS GRAMLING
J. EDWARD WORTON
Counsel for Petitioner

August, 1959

APPENDIX

APPENDIX

Order of Dismissal

Filed, Miami, Fla., July 3, 1958. Julian A. Blake, Clerk.

[TITLE OMITTED]

This cause, coming on to be heard, was submitted upon the several Motions filed in behalf of each defendant, respectively.

Grounds of the Motions attacking the regularity of proceedings before a Grand Jury of the Tampa Division of this District, resulting in the return of the instant indictment, after a Grand Jury of the Miami Division had preempted the investigation of accusations against these defendants, are without legal merit. United States v. Thompson, 251 U.S. 407; Seadlund v. United States, 97 F. (2d) 742.

Assuming, arguendo, that the indictment herein was returned by the Tampa Grand Jury after hurried and superficial deliberation upon hearsay evidence, this Court may not dismiss the indictment because it was not supported by adequate or competent evidence. Costello vs. United States, 350 U.S. 359.

As previously indicated in the course of oral arguments, the Court is of the opinion that unintentionally and inadvertently, the Grand Jury, by re-alleging each of the allegations of paragraphs 1 through 14 of the first count of the indictment imported into the subsequent substantive counts (two through twenty-one) dual charges of a conspiracy and the violation of a statute creating a substantive offense. Because of duplicity each of such counts is subject to the motion to dismiss.

The conspiracy count (count one) presents some difficulty. The first two statutory criminal offenses which the defendants are alleged to have conspired to commit are those defined by 18 U.S.C.A. Sections 656 and 657. The

language of each statute was followed precisely in charging the defendants with a conspiracy "to wilfully misapply and wilfully cause to be misapplied moneys," etc. of the named banks,—"with intent to injure and defraud the said banks."

Recognizing that the phrases "to willfully misapply" and "wilfully cause to be misapplied" are generic terms having no settled, technical meaning, United States v. Cawthon, 125 F. Supp. 419, the Grand Jury proceeded to spell out the quo modo of misapplication.

It is the Court's opinion that the Grand Jury fell into the error of supposing that any use or disposition of the moneys or funds of a "National" or "Member bank" in any manner or for any purpose proscribed by the Federal Reserve Act, as amended, and more particularly by the provisions of 12 U.S.C.A. Sections 371 and 371c, constitutes a criminal offense. These sections do not of themselves create any offense against the United States. Therefore, on the authority of United States v. Britton, 108 U.S. 199, the alleged acts of defendants in violations of these sections do not amount to criminal misapplication of moneys or funds, although they may raise the question of maladministration.

Consistent with the foregoing views, briefly expressed, it is ordered, adjudged and decreed by the Court that the indictment in criminal Case No. 10,529-M-Cr. against Baron DeHirsch Meyer, Leonard L. Abess, W. George Kennedy and Sam R. Becker, be, and the same is hereby, Dismissed as to each defendant.

DONE and ORDERED in chambers at Miami, Florida this 3rd day of July, 1958.

/s/ SEYBOURN H. LYNNE,
United States District Judge by Designation.

Judgment

Extract from the Minutes of May 5, 1959.

No. 17371

UNITED STATES OF AMERICA,

versus

BARON DE HIRSCH MEYER, LEONARD L. ABESS, W. GEORGE KENNEDY and SAM R. BECKER

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that, as to each count of the indictment, the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court.

"Rives, Circuit Judge, dissenting in part."

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17371

UNITED STATES OF AMERICA, Appellant,

v.

BARON DE HIRSCH MEYER, LEONARD L. ABESS, W. GEORGE KENNEDY and SAM R. BECKER, Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(May 5, 1959.)

Before RIVES, TUTTLE, and JONES, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a judgment sustaining a motion to dismiss an indictment of twenty-one counts, which occupy forty-seven pages of the printed record.

Count one of the indictment is drawn under the general conspiracy statute, Title 18, United States Code, Section 371, proscribing a conspiracy "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." It charges that the four named defendants together with Nathaniel B. Elkins, named as co-conspirator but not defendant, conspired to violate Title 18, Sections 656, 657, and 1006 of the United States Code in the manner and by the means set forth in the count.

Section 656 of Title 18 makes it a criminal offense for an officer, director or agent of a Federal Reserve bank, member bank, national bank or insured bank to embezzle, abstract, purloin or *wilfully misapply* any of the moneys, funds or credits of such bank. Section 657 proscribes the like offense when committed against an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. Section 1006 makes criminal the act of an officer, agent or employee who, with intent to defraud any such institution or to deceive any auditor or examiner or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or who, with intent to defraud the United States or any agency thereof, participates or shares in or receives directly or indirectly any money, profit, property or benefits through any transaction, loan, commission, contract or any other act of such institution.

Substantially following the language of those three sections, count one describes the banks and financial institutions and the positions in such banks and institutions held by each of the four defendants, and charges them and the co-conspirator with conspiring:

> "(a) to wilfully misapply and wilfully cause to be misapplied moneys, funds and credits of the Industrial Savings Bank, the Industrial National Bank and North Shore Bank to the use, benefit and advantage of the said defendants so that the said moneys, funds and

credits would be withdrawn from and lost to the said banks during the period that the said moneys, funds and credits were beyond the control of the said banks, with intent to injure and defraud the said banks;

"(b) to wilfully misapply and wilfully cause to be misapplied moneys, funds and credits of the said Miami Beach Federal Savings and Loan Association to the use, benefit and advantage of the said defendants so that the said moneys, funds and credits would be withdrawn from and lost to the said Miami Beach Federal Savings and Loan Association during the period that the said moneys, funds and credits were beyond the control of the said Association, with intent to injure and defraud the said Miami Beach Federal Savings and Loan Association;

"(c) to make and cause to be made false entries in the books and statements of the Miami Beach Federal Savings and Loan Association and to make and cause to be made material false statements in the reports of the said Association with intent to defraud the said Miami Beach Federal Savings and Loan Association and to deceive the officers, auditors, examiners and agents of the Home Loan Bank Board and the Federal Home Loan Bank Board, Departments and Agencies of the United States of America;

"(d) to participate and share in and receive directly and indirectly money, profits, property and benefits through transactions and loans of the said Miami Beach Federal Savings and Loan Association, with the intent to injure and defraud the Federal Savings and Loan Insurance Corporation and Miami Beach Federal Savings and Loan Association."

Those allegations are followed by a paragraph which contains the count's only reference to Sections 371 or 371c mentioned by the district court in assigning its reasons for dismissing count one, and which paragraph is therefore quoted:

"That it was a further part of the said conspiracy for the defendants, who maintained control over the operations of the North Shore Bank to knowingly and wilfully allow and permit the said institution to lend money to the corporations named in paragraphs 5, 6 and 7 herein in a manner and means not permitted under the Federal Banking Laws, to wit, Title 12, United States Code, Section 371(c), in that such loans would not be secured by the collateral required by that section; moreover that such loans would be caused to be made, without disclosing to said bank that said loans involved no bonafide transactions of the said borrower, but that said loans would be used for the purpose of temporarily repaying loans to Federal Title and Insurance Corporation in order temporarily to improve the financial position of said corporation, and without disclosing that the proceeds of said loans were to be converted to the use of the defendants through Federal Title and Insurance Corporation."

As would be gathered from that reference to Title 12, United States Code, Section 371(c), it prescribes the kind of collateral which must secure a loan or extension of credit from a member bank to one of its affiliates. Violation of that section is not, however, made a criminal offense.

The paragraph last quoted is followed by four other paragraphs each, like the quoted paragraph, beginning with the words, "That it was a further part of said conspiracy . . ." To facilitate an understanding of this opinion, we quote the opening clauses of each of those four paragraphs:

"That it was a further part of the said conspiracy for the defendants who maintained control of the said Industrial National Bank, North Shore Bank and Miami Beach Federal Savings and Loan Association to knowingly and wilfully allow and permit the said financial institutions to lend money to builders who

were engaged in construction work on properties upon which the defendants had a financial interest. . . .

"That it was a further part of the said conspiracy for the defendants, acting through one of the corporations named in paragraphs 5, 6 or 7[1] to cause one of those corporations and or builders to borrow funds from Industrial Savings Bank, Industrial National Bank, North Shore Bank and Miami Beach Federal Savings and Loan Association, which funds would be used by the said defendants for their own personal use and gain. . . .

"That it was a further part of the said conspiracy to make and cause to be made false entries in the books, reports and statements of the Miami Beach Federal Savings and Loan Association in that the said defendants would have the responsibility and duty of approving applications for construction loans from Miami Beach Federal Savings and Loan Association and would knowingly and wilfully fail to disclose to the Miami Beach Federal Savings and Loan Association on such applications that there was in existence an unrecorded purchase money mortgage from the applicant for construction loans to one of the corporations named in paragraphs 5, 6 or 7 herein . . .

"That it was a further part of the said conspiracy for the defendants to participate and share in and receive directly and indirectly moneys, profits, property and benefits to transactions and loans of the Miami Beach Federal Savings and Loan Association wherein

[1] Paragraphs 6 and 7 name six corporations, the sole stockholder of which is Federal Title and Insurance Corporation, and two corporations, 96% of the stock of which is owned by Federal Title & Insurance Corporation. Paragraph 5 further alleges: "that a majority of the Board of Directors of said Federal Title and Insurance Corporation from September 4, 1952, through December 31, 1956, consisted of Abess, Meyer and Kennedy, who also maintained control over the corporations named in Paragraphs 6 and 7 hereinafter set forth."

the said defendants approved and caused to be approved loans to builders from Miami Beach Federal Savings and Loan Association upon property in which the defendants had and which the defendants would have a financial interest . . ."

Count one closes with the averment of the commission of certain overt acts in furtherance of the alleged conspiracy.

The district court expressed its reasons for sustaining the motion to dismiss count one as follows:

"The conspiracy count (count one) presents some difficulty. The first two statutory criminal offenses which the defendants are alleged to have conspired to commit are those defined by 18 U.S.C.A. Sections 656 and 657. The language of each statute was followed precisely in charging the defendants with a conspiracy 'to wilfully misapply and wilfully cause to be misapplied moneys,' etc. of the named banks,—'with intent to injure and defraud the said banks.'

"Recognizing that the phrases "to wilfully misapply' and 'wilfully cause to be misapplied' are generic terms having no settled, technical meaning, United States v. Cawthon, 125 F. Supp. 419, the Grand Jury proceeded to spell out the quo modo of misapplication.

"It is the Court's opinion that the Grand Jury fell into the error of supposing that any use or disposition of the moneys or funds of a 'National' or 'Member bank' in any manner or for any purpose proscribed by the Federal Reserve Act, as amended, and more particularly by the provisions of 12 U.S.C.A. Sections 371 and 371c, constitutes a criminal offense. These sections do not of themselves create any offense against the United States. Therefore, on the authority of United States v. Britton, 108 U.S. 199, the alleged acts of defendants, in violations of these sections do not

amount to criminal misapplication of moneys or funds, although they may raise the question of maladministration."

At the outset we are confronted with a question of jurisdiction, that is whether the appeal from the judgment dismissing count one is properly taken to this Court or should have been taken direct to the Supreme Court of the United States under the Criminal Appeals Act, Title 18, United States Code, Section 3731. The original Criminal Appeals Act provided for appeals by the United States directly to the Supreme Court from a judgment dismissing an indictment or any count thereof where the judgment was based upon the invalidity or construction of the statute upon which the indictment or count was founded, or where the judgment sustained a motion in bar before the defendant had been put in jeopardy. In 1942, the Act was amended to confer jurisdiction on the courts of appeals in such cases "except where a direct appeal to the Supreme Court of the United States is provided by this section."[2] The distinction is that such an appeal involving a matter of substance, the validity or construction of the statute on which the count is founded, or a motion in bar, goes to the Supreme Court; whereas, an appeal involving a matter of procedure or question of pleading goes to the court of appeals.[3] If the district court held that the count, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statutes upon which it is founded, then the appeal goes

[2] The original act is quoted in United States v. Borden Co., 1939, 308 U.S. 188, 192, footnote 1. The purpose and legislative history of the 1942 amendment conferring jurisdiction on the courts of appeals are recounted in United States v. Swift & Co., 1943, 318, 442, 444, 445.

[3] Moore's Commentary on the United States Judicial Code, pp. 483, 484.

direct to the Supreme Court.[4] If the district court based its decision on a mere defect in pleading, then this Court has jurisdiction of the appeal.

Thus, solution of the jurisdictional question requires us to determine the basis of the district court's judgment. The difficulty which we have encountered prompts us to repeat the wise suggestion of Mr. Justice Jackson in his concurring opinion in *United States v. Swift & Co.*, 1943, 318 U.S. 442, 446:

> ". . . In connection with the difficult problems that come up as a result of a dual appeal, we would be greatly aided if the District Courts in dismissing an indictment would indicate in the order the ground, and, if more than one, would separately, state and number them. I am confident that a request from the Government to do so would generally be granted and that to do so would be of assistance to the Government in taking, and to us in passing on, appeals."

In urging that the appeal should have been taken directly to the Supreme Court, the appellees emphasize the concluding sentence of the district court's reasoning, which we have heretofore quoted in full. Read in context, the meaning of that sentence depends upon the words "these sections," and the sections referred to are Sections 371 and 371e of Title 12, United States Code. Those sections are not among the statutes upon which the count is founded.

The statute upon which a count is founded is "to be determined as a matter of law from the facts therein charged." *United States v. Nixon*, 1914, 235 U.S. 231, 235.

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[4] See, United States v. Keitel, 1908, 211 U.S. 370, 385; United States v. Corbett, 1909, 215 U.S. 233, 237; United States v. Heinze, 1910, 218 U.S. 532, 540; United States v. Patten, 1913, 226 U.S. 525, 535; United States v. Birdsall, 1914, 233 U.S. 223, 230; United States v. Nixon, 914, 235 U.S. 231, 235, 236; United States v. Wayne Pump Co., 1942, 317 U.S. 200, 206, 207; United States v. Hvass, 1958, 355 U.S. 570, 574.

"... The statute, at the violation of which the conspiracy is aimed, has been treated as the statute upon which the indictment is founded within the meaning of the Criminal Appeals Act. *United States v. Bowman*, 260 U.S. 94, 95; *United States v. Walter*, 263 U.S. 15, 16, 17. See, also, *United States v. Keitel*, 211 U.S. 370, 387." *United States v. Kapp*, 1937, 302 U.S. 214, 216.

The Government agrees with the district court that Title 12, United States Code, Sections 371 and 371c do not of themselves create any offense against the United States. If, then, the district court construed only Sections 371 and 371c of Title 12, and its construction of these sections is conceded to be proper, a direct appeal to the Supreme Court would be meaningless, for the Supreme Court's jurisdiction in such cases "is limited to the construction of the statute involved." *United States v. Hood*, 1952, 343 U.S. 148, 150; *United States v. Petrillo*, 1947, 332 U.S. 1, 5; *United States v. Borden Co.*, 1939, 308 U.S. 188, 193.

So also at this late date no substantial question can be raised but that the words "wilfully misapplies" as used in Sections 656 and 657 of Title 18, United States Code, mean a criminal misapplication rather than a mere act of maladministration. *United States v. Britton*, 1883, 108 U.S. 199, 206. As said in the earlier *Britton* appeal, 1882, 107 U.S. 655, 668, "it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate or some natural person." An appeal to the Supreme Court is not needed to have repeated this long-settled construction of the term "wilfully misapplies."

The district court in effect held that the single reference to Section 371c of Title 12, United States Code, operated to refute all of the charges of wilful misapplication of moneys, funds and credits. We construe its holding to be

in effect procedural, or based on a claimed defect in pleading, rather than upon the construction of any of the statutes upon which the count is founded, and, therefore, conclude that this Court has jurisdiction of the appeal from the dismissal of count one.

Very clearly, the single reference to Section 371c of Title 12, United States Code, does not prevent the count from charging a criminal conspiracy. The several other paragraphs beginning with the words, "That it was a further part of said conspiracy," contain no reference to that section. That the count charges a wilful, criminal misapplication of funds is shown by the definite charge in paragraphs lettered (a) and (b), heretofore quoted, that the misapplication was "to the use, benefit and advantage of the said defendants" and "with intent to injure and defraud the said banks" and, respectively, "the said Miami Beach Federal Savings and Loan Association."

Neither Section 371c of Title 12, United States Code, nor the meaning of the term "wilfully misapplied," has even a remote connection with those parts of the count which charge a conspiracy to violate Section 1006 of Title 18, United States Code. Compare *United States v. Britton, supra*, 107 U.S. at pp. 663-665.

The appellees insist, however, that the averments of the count are otherwise insufficient to charge a conspiracy to violate Section 1006. The prohibition of false entries by that section is in broad and comprehensive terms. Compare *United States v. Britton, supra*, 107 U.S. at pp. 663, et seq.; 9 C.J.S., Banks & Banking, Sec. 149(a). Knowingly and wilfully representing that a proposed construction loan was legitimate by *failing* to disclose on a loan application to one of the financial institutions named in Section 1006 an unrecorded mortgage from the applicant to a corporation owned and controlled by the defendants, or by giving a negative answer to some questionnaire, when made with the requisite intent to defraud the lending institution or to deceive the auditors and examiners or a Government

agency, would clearly constitute a false entry in a report or statement to the institution.[5]

Appellees complain that the reviser of the 1948 revision of the criminal code combined some eleven sections of the 1940 Code to create Section 1006 and, in so doing, made the "participation" provisions of certain other sections applicable to federal savings and loan associations, but made no mention in the Revisers' Notes of the fact that the revised section created new criminal offenses. Without stopping to substantiate the details of that contention, it is enough to say that the language of Section 1006 clearly and unmistakably expresses an intention to make the "participation" provisions apply to each kind of institution named in the section; and that the authorities relied on by the appellees have no application when the intention expressed in the section itself is clear. *Fourco Glass Co. v. Transmirra Corp.*, 1957, 353 U.S. 222, 227; *Anderson v. Pacific Coast SS Co.*, 1912, 225 U.S. 187, 199.

We find no merit in any of the appellees' criticisms of count one of the indictment, and conclude that the district court erred in sustaining the motion to dismiss said count.

Counts two through twenty-one, inclusive, charge all or certain of the four defendants with substantive violations of one or more of the same sections 656, 657, or 1006 of Title 18, United States Code.

The district court dismissed each of those counts for duplicity, saying:

> "As previously indicated in the course of oral arguments, the Court is of the opinion that unintentionally and inadvertently, the Grand Jury, by re-alleging each of the allegations of paragraphs 1 through 14 of the

[5] Appellees miss the point of the fraud and deceit charged when they argue that the unrecorded mortgage must have constituted a lien effectual as to the lending institution. The fraud and deceit charged consisted in the concealing by the defendants of their interest in the transaction.

first count of the indictment imported into the subsequent substantive counts (two through twenty-one) dual charges of a conspiracy and the violation of a statute creating a substantive offense. Because of duplicity each of such counts is subject to the motion to dismiss."

As the language of Section 3731, Title 18, United States Code, indicates, its application requires that the dismissal of each count of the indictment be considered separately. *United States v. Borden Co.*, 1939, 308 U.S. 188, 193. In that case it was held that a direct appeal to the Supreme Court was not provided from a decision dismissing one of the counts held bad upon the ground "that it is defective as a pleading being duplicitous. . . ." Clearly, therefore, this Court has jurisdiction of so much of the appeal as involves the dismissal of the substantive counts; counts two through twenty-one, inclusive.

Paragraph numbered 1 of each of these substantive counts is identical:

> "1. The Grand Jury realleges each of the allegations of Paragraphs 1 through 14 of the first count of this indictment."[6]

The district court construed that paragraph as importing into each of the substantive counts the entire first count of the indictment. If that were the meaning then there was no purpose in particularizing "paragraphs 1 through 14." Clearly, the Grand Jury meant to reallege something less than all of the first count of the indictment.[7] We find our-

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[6] Rule 7, Federal Rules of Criminal Procedure expressly provides that, "Allegations made in one count may be incorporated by reference in another count."

[7] Indeed the district court itself, somewhat paradoxically we think, characterizes its construction of the indictment by the phrase that "! . . unintentionally and inadvertently, the Grand Jury, etc. . . ."

selves in complete agreement with the succinct refutation of the charge of duplicity contained in the Government's brief."

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[1] "Examination of the indictment reveals that paragraphs one through fourteen of the first count of the indictment set out certain preliminary facts, identifying the financial institutions involved in the case, the federal agencies with which they were affiliated, the positions held by each of the four defendants in such financial institutions, the relationship of certain subsidiary corporations to another corporation, namely, Federal Title and Insurance Corporation, and finally in separate paragraphs (11, 12, 13 and 14) the percentage of stock ownership of each of the four defendants in Federal Title and Insurance Corporation. Paragraph 14 of count one consists of a single sentence and a single allegation of fact:

"'14. That from on or about April 27, 1951, and continuing through December 31, 1956, Sam R. Becker owned approximately 7% of the outstanding stock of Federal Title and Insurance Corporation.'

"After Paragraph 14, and separated from it by a double space there come the standard words: 'The Grand Jury further charges.'

"Thereafter there appears the charging portion of the conspiracy count setting forth the time, place and venue, the statutes involved, the manner and means of the conspiracy and certain overt acts. This portion of count one consists of eight main paragraphs each double spaced and indented from the text above. Some of these paragraphs include lettered sub-paragraphs.

"Counts two through twenty-one each contain an identical first paragraph which in standard form realleges the preliminary facts set forth in paragraphs one through fourteen in Count I.

"In view of the physical arrangement of the text of count one and the whole indictment, the indentation of paragraphs, the double spacing between paragraphs, the interjection of the familiar phrase 'The Grand Jury further charges' which separates paragraphs 14 and the paragraphs which follow it, the obvious difference in thought content and subject matter between paragraph 14 and the charging paragraphs below, it is difficult to follow the reasoning of the Court below that the reiteration in each of the subsequent counts of Paragraphs 1-14 of Count one had the force and effect of tacking on to each of the remaining twenty counts the conspiracy count set forth in count one.

"The reiteration of preliminary facts or allegations in subsequent counts of an indictment, as occurred here, is standard practice; it encourages brevity and clarity; it aids in focusing attention

The appellees urge upon us, however, that they are not restricted to sustaining the defect of duplicity but that,

> ". . . It is a rule applicable to appeals in criminal as well as civil cases that 'a successful party in the District Court may sustain its judgment on any ground that finds support in the record.' *Jaffke v. Dunham* (1957), 352 U.S. 280, 281, 77 S. Ct. 307, 308, 1 L.Ed. 2d 314; *United States v. Curtiss-Wright Export Corporation* (1936), 299 U.S. 304, 329, 330, 57 S. Ct. 216, 225, 81 L.Ed. 255; *United States v. Kahriger* (1953), 345 U.S. 22, 33 (Footnote 14), 73 S. Ct. 510, 516, 97 L. Ed. 754; *Posey v. Tennessee Valley Authority* (CCA 5, 1937, 93 F. 2d 726."

We agree with that principle and proceed to examine the other grounds of the motions to dismiss these substantive counts.

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on the main thrust of the separate count or cause of action. Such was the intent in the use of this technique in counts two through twenty-one of this indictment."

". . . . .

"To hold that the numbered paragraph 14 of count one must of necessity incorporate all of the remaining unnumbered paragraphs of the count ignores the physical arrangements of the pleading, the settled meaning of the word 'paragraph,' and the effect of the statement, 'The Grand Jury further charges' which separates paragraphs 1-14 from the remaining content in count one.

"At best the fact that the paragraphs of count one beyond paragraph 14 were not numbered, can only be considered as a technical point. And the strict technical requirements of pleading have been replaced by a liberality of construction permitted by the Federal Rules of Criminal Procedure.

"*Federal Rules of Criminal Procedure 7 and 52a.* (See also Rule 2.) Moreover, the adequacy and sufficiency of indictments can in modern times be considered on the basis of practical, as opposed to technical considerations. *Hagner v. U.S.*, 285 U.S. 427, 431; *U.S. v. Achtner*, 144 F.2d 49, 51; *Anderson v. U.S.*, 215 F.2d 84, 86-87; *Beard v. U.S.*, 82 F.2d 837, 840; *Johnson v. U.S.*, 207 F.2d 314, 319. (See, also, *U.S. v. Debrow*, 1953, 346 U.S. 374, 376.)"

Counts two through ten, inclusive, charge substantive violations of Title 18, United States Code, Section 656, against two of the defendants, Meyer and Abess. Count two is typical and we quote its averments in full:

"Count Two

"The Grand Jury further charges:

"1. The Grand Jury realleges each of the allegations of Paragraphs 1 through 14 of the first count of this indictment;

"2. That on or about the 29th day of December, 1954, in Dade County, Southern District of Florida,

"Baron DeHirsch Meyer and Leonard L. Abess, defendants herein, being then and there members of the Executive Committee, the Loan and Discount Committee and directors of the North Shore Bank, said bank being then and there a state bank authorized and existing under the laws of the State of Florida and insured by the Federal Deposit Insurance Corporation under Certificate No. 16497 and a member of the Federal Reserve System, and said defendants further being stockholders and directors of the Federal Title and Insurance Corporation, the majority directors of said Federal Title and Insurance Corporation being directors of said North Shore Bank, with intent to defraud said North Shore Bank, did wilfully misapply and cause to be misapplied moneys, funds and credits of and intrusted to the custody and care of said North Shore Bank, in the following manner: the defendants herein caused said North Shore Bank to make a loan and extend credit of $80,000 to Austin-Scott, Inc., a corporation whose stock was wholly owned by the Federal Title and Insurance Corporation and an affiliate of said North Shore Bank within the terms of 12 U. S. C. 221 (a)(b)(3) as the defendants well knew, without requiring adequate security for

said loan and credit, without the prior approval of the Board of Directors of said North Shore Bank, at a low rate of interest, without disclosing to said bank the affiliation between the borrower and said bank, without disclosing to said bank that said loan and credit was related to no legitimate transaction engaged in by said borrower, without disclosing to said bank that the loan was to be used and was used by said borrower for the purpose of repaying a loan made by the Federal Title and Insurance Corporation to said borrower so that the financial cash condition of said Federal Title and Insurance Corporation could be temporarily improved, without disclosing to said North Shore Bank that the proceeds of said loan would be and were used by Austin-Scott, Inc. to repay a loan which it had received from its parent corporation, Federal Title & Insurance Corporation, and that the only means by which Austin-Scott, Inc. could repay the unsecured loan from the North Shore Bank would be by obtaining the necessary funds from said Federal Title & Insurance Corporation, all this being done before the Board of Directors of the North Shore Bank approved the loan to Austin-Scott, Inc., without disclosing to said North Shore Bank the inadequate financial condition of said Austin-Scott, Inc., which fact further jeopardized the money, funds and credits of the North Shore Bank, without disclosing to said North Shore Bank that the actual beneficial recipient of the loan and credit was the Federal Title and Insurance Corporation and that the proceeds of the loan were converted to the use of the defendants for their own personal gain through said Federal Title and Insurance Corporation, the entire purpose of said loan transaction being in bad faith, in violation of sound banking practice, brought about only by the influence of said defendants in said North Shore Bank, against the interests of the North Shore Bank and made only to

serve the personal interests of said defendants, and calculated to defraud and injure said North Shore Bank; in violation of 18 U.S.C. 656."

A majority of the judges of the panel deciding this case are of the opinion that counts two through ten are adequate to charge violations of 18 U.S.C. 656 and to apprise the defendants of the accusations in such manner as to permit them to prepare their defenses and to protect them against another prosecution on the same charges. The writer thinks that counts two through ten are bad on motion to dismiss, and expresses his views in the marginal footnote.*

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* RIVES, Circuit Judge, briefly in dissent:

Upon timely objection by motion to dismiss, a defendant can insist upon defects and imperfections in an indictment which might be waived or cured if he waited until after verdict. United States v. Williams, 5th Cir. 1953, 202 F.2d 712, 713; same case 203 F.2d 572, 573; Vasquez v. United States, 5th Cir. 1956, 229 F.2d 288, 289; 42 C.J.S., Indictments and Informations, § 301; 27 Am.Jur., Indictments and Informations, § 187. The mere legal conclusions at the end of the counts (See Clay v. United States, 5th Cir. 1955, 218 F.2d 483, 486), and the matters alleged only indirectly or impliedly in the clauses which begin "without disclosing that" (United States v. Williams, supra; Robertson v. United States, 5th Cir. 1948, 168 F.2d 294; United States v. Lamont, S.D.N.Y. 1955, 18 F.R.D. 27, 30, aff'd 2nd Cir. 1956, 236 F.2d 312; 4 Barron's Federal Practice & Procedure, Rules Edition, § 1914, p. 67; 4 Wharton's Criminal Law and Procedure, § 1762; 42 C.J.S., Indictments and Informations, § 99; 27 Am.Jur., Indictments and Informations, § 57.) should not be considered in determining the sufficiency of the counts on motion to dismiss. Otherwise, the constitutional requirement of indictment by a Grand Jury contained in Amendment 5, and the requirement of Amendment 6 (See United States v. Cruikshank, 1875, 92 U.S. 542, 557, 558.) that the accused "be informed of the nature and cause of the accusation" might be eroded. Such averments as "without requiring adequate security" and "at a low rate of interest" are so indefinite as to leave the standard of guilt to the variant views of different juries. Compare United States v. Cohen Grocery Co., E.D.Mo. 1920, 264 F.2d 218, 220, aff'd 1921, 255 U.S. 81, see pages 89, et seq. Rule 7(c) of the Federal Rules of Criminal Procedure still requires

Counts eleven and twelve charge that the defendant Becker violated Title 18, United States Code, Section 1006 by submitting to an examiner material false reports of the Miami Beach Federal Savings and Loan Association with intent to deceive the examiner. Those counts definitely describe the statements, the particulars of their alleged falsity, and charge that at the times of submitting the reports to the examiner the defendant Becker knew of such falsity. They sufficiently charge each element of the false report offense defined in Section 1006.

Counts thirteen through seventeen, inclusive, charge substantive violations of Title 18, United States Code, Section 657 against all four defendants. The manner of the alleged misapplication of moneys, funds and credits is similarly alleged in each of these counts and, as typical, we quote such averments of count thirteen:

> "... the defendants herein did approve a construction loan to Audubon Homes, Inc. in the amount of $547,400 on the security of certain real estate, the defendants then and there well knowing that there was in existence a prior purchase money mortgage on said real estate from Audubon Homes, Inc. to Federal Title and Insurance Corporation, a corporation in which the defendants were directors and had a financial interest, said real estate having been sold to Audubon Homes, Inc. by Federal Title and Insurance Corporation, which purchase money mortgage was not sub

"a *plain*, concise and *definite* written statement of the essential *facts* constituting the offense charged." If we eliminate from counts two through ten the legal conclusions, the indirect expressions and implied allegations, and the averments of matters of opinion, sufficient plain and definite statements of facts are not left to constitute a wilful misapplication within the requirements of United States v. Britton, 1882, 107 U.S. 655, 668; same case, 1883, 108 U.S. 199, 206.

ordinated to said construction loan mortgage held by the Miami Beach Federal Savings and Loan Association, and which purchase money mortgage was not disclosed to the Miami Beach Federal Savings and Loan Association, thereby causing the security of said Association to be inferior and not a first lien as required by Statute to the said purchase money mortgage and jeopardizing the money funds and credits of Miami Beach Federal Savings and Loan Association and to the benefit of said defendants, and further, said loan was made in disregard of the inadequate financial condition of said Audubon Homes, Inc. and under circumstances whereby losses which might result from the construction activities of Audubon Homes, Inc. financed by the aforesaid construction loan would fall first on Miami Beach Federal Savings and Loan Association, whereas the defendants and corporations in which they held large interests as stockholders would derive large profits in the event the business transactions financed by said loans were successful, the entire purpose of said loan transaction being in violation of sound banking practice, against the interest of said Miami Beach Federal Savings and Loan Association and to the personal interest of said defendants, in bad faith, brought about only because of the influence of said defendants in the Miami Beach Federal Savings and Loan Association, and calculated to injure and defraud the Miami Beach Federal Savings and Loan Association. . . ."

A majority of the judges of the panel deciding this case are of the belief that counts thirteen to seventeen, inclusive, sufficiently allege the misapplication of funds of a savings and loan association by the investment in mortgages which

were not first liens. The writer, believing otherwise, expresses his views in the marginal footnote.[*]

Counts eighteen through twenty-one, inclusive, charge substantive violations of Title 18, United States Code, Section 1006 against all four defendants. Count eighteen is typical. It charges that the defendants,

> ". . . then and there being officers, agents and employees of the Miami Beach Federal Savings and Loan Association, did participate and share in and receive indirectly through Federal Title and Insurance Corporation money, profit, property and benefits, to-wit: the sum of $27,000 in the name of Federal Title and Insurance Corporation, through a loan from Miami Beach Federal Savings and Loan Association to Vivian J. Inc., in the sum of $293,750, with intent to defraud the Miami Beach Federal Savings and Loan Association, in violation of Title 18, United States Code, Section 1006."

Each element of the "participation" offense denounced by Section 1006 is plainly, concisely and definitely stated (see Rule 7(c), Federal Rules of Criminal Procedure), the loan is identified, the amount of participation on the part of the defendants described, and the way in which it was received averred, that is, in the name of Federal Title and Insurance Corporation. The district court erred in dismissing counts eighteen through twenty-one, inclusive.

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[*] Rives, Circuit Judge, briefly in dissent as to the sufficiency of counts thirteen through seventeen:

Supplementing the views stated in footnote 9, the writer would add that the *facts* stated do not support the conclusionary statement "thereby causing the security of said Association to be inferior and not a first lien as required by Statute to the said purchase money mortgage," because it is affirmatively alleged that the purchase money mortgage was not disclosed to the Association, and it is not alleged that the purchase money mortgage was recorded according to law. See Section 695.01, Florida Statutes 1957.

A majority of the judges of the panel deciding this case hold that the district court erred in dismissing each count of the indictment. The writer concurs except as to counts two through ten and thirteen through seventeen. See Footnotes 9 and 10, supra. As to each count of the indictment, the judgment is reversed and the cause remanded.

Reversed and Remanded.

A true copy

Test: Edward W. Wadsworth, Clerk, U. S. Court of Appeals, Fifth Circuit.

By Clara R. James, Deputy.

New Orleans, Louisiana, August 6, 1959.

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 324

W. GEORGE KENNEDY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 325

BARON DE HIRSCH MEYER, LEONARD L. ABESS AND SAM R. BECKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 266 F. 2d 747. The opinion of the district court (appended to each petition) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered May 5, 1959. Petitions for rehearing were denied July 20, 1959. The petitions for writs of certiorari were filed August 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly interpreted the decision of the district court on the conspiracy count as holding the indictment defective as a pleading.

2. Whether the grand jury in Tampa, Florida, had authority to return the indictment after Miami grand juries had failed to indict.

3. Whether the indictment sufficiently alleged willful misapplication of bank funds under 18 U.S.C. 656.

4. Whether a false report with intent to deceive an examiner of the Federal Home Loan Bank Board is an offense under 18 U.S.C. 1006.

5. Whether counts charging misapplication of bank funds for the personal benefit of petitioners by granting loans on the security of certain land on which they knew there were prior purchase money mortgages charged offenses under 18 U.S.C. 657.

6. Whether the participation provisions of 18 U.S.C. 1006 apply to officers of a federal savings and loan association and whether the counts based thereon sufficiently charged an offense under the statute.

STATUTES INVOLVED

18 U.S.C. (1952 ed.) 656, 657, and 1006 are set forth in the Appendix, *infra*, pp. 16-18.

STATEMENT

An indictment returned against petitioners in the United States District Court for the Southern District of Florida charged them, as officers and directors of a federally insured bank and a federal savings association, with various offenses under the laws of the United States relating to such institutions.

The first count charged a conspiracy to violate 18 U.S.C. 656, 657, and 1006 by willfully misapplying funds of such institutions to the use and benefit of petitioners, with intent to defraud the institutions; causing false entries and reports to be made; and participating "directly and indirectly" in benefits from loans by the federal association. It was charged that petitioners conspired to have various corporations purchase undeveloped property and convey it to a builder for an excessive price, or on a profit-sharing arrangement, petitioners to arrange a construction loan to these corporations. Petitioners, by their control of the North Shore Bank, would permit the institution to lend money without the collateral required by 12 U.S.C. 371c and without disclosing that the money was to be converted to the use of petitioners through a corporation, Federal Title and Insurance Company, of which they were majority stockholders. It was further charged that, as part of the conspiracy, petitioners would fail to disclose unrecorded purchase money loans on property for which construction loans would be given. It was alleged that such loans would be made to injure and defraud the institution, and that the funds would be lost to the institution while the loans were unrepaid (R. 1-13).

Counts 2-10 charged petitioners Meyer and Abess

with misapplication of the funds of the North Shore Bank in violation of 18 U.S.C. 656. Each count was based on a separate loan to a wholly owned subsidiary of Federal Title and Insurance Corporation, of which the two petitioners were stockholders and directors, and the majority of whose stockholders and directors were directors of North Shore. It was alleged in each count that the loan was made "without requiring adequate security", without approval by the directors of North Shore, "at a low rate of interest", without disclosing to North Shore the affiliation between the borrower and the bank, the poor financial condition of the borrower, and the fact that the loan was for no legitimate transaction by the borrower, but was to be used by the borrower to repay a loan to Federal Title, the parent corporation. It was further alleged that the "proceeds of the loan were converted to the use of the defendants for their own personal gain through said Federal Title and Insurance Corporation, the entire purpose of said loan transaction being in bad faith, in violation of sound banking practice, brought about only by the influence of said defendants in said North Shore Bank, against the interests of the North Shore Bank and made only to serve the personal interests of said defendants, and calculated to defraud and injure said North Shore Bank" (R. 13-31).

Counts 11 and 12 charged petitioner Becker with violations of 18 U.S.C. 1006 by making false reports to an examiner of the Federal Home Loan Bank, an agency of the Federal Housing and Home Finance Agency, with respect to the Miami Beach Federal Savings and Loan Association with intent to deceive the examiner, to the effect that the Association had made no loans

on the security of real estate in which directors and officers had an interest whereas petitioners did have a financial interest in the loans (R. 31-35).

Counts 13-17 charged all four petitioners with violations of 18 U.S.C. 657 in that, as members of the loan committee of the Miami Beach Federal Savings and Loan Association, they willfully, with intent to defraud the association, misapplied funds of the Association by approving loans on real estate "then and there well knowing that there was in existence a prior purchase money mortgage on said real estate", given by the borrower to Federal Title, a corporation in which petitioners had an interest. It was alleged that the purchase money mortgage "was not subordinated to said construction loan mortgage" held by the federal association, and that the purchase money mortgage was not disclosed to the federal association, "thereby causing the security of said Association to be inferior and not a first lien." It was further alleged that the loan was made in disregard of the inadequate financial condition of the borrower under circumstances whereby any losses from the construction activities of the borrower would fall on the federal association, whereas petitioners and the corporations would derive large profits if the business were successful. These counts charged that the transactions were in bad faith, against the interests of the association, and for the personal interests of petitioners (R. 35-45).

Counts 18-21 charged the four petitioners with violations of 18 U.S.C. 1006 in the conduct of the affairs of the Miami Beach Federal Savings and Loan Association, in that with intent to defraud the bank they "did participate and share in and receive indirectly

through Federal Title and Insurance Company," a specific sum of money through a loan by the association to a named person (R. 45-48).

On motions of the petitioners, the district court dismissed the indictment. As to the substantive counts, the district court held that the reference in each of them to paragraphs 1-14 of the conspiracy count (setting forth the nature of the corporations involved and their officers) inadvertently incorporated the conspiracy count, and rendered those counts duplicitous. As to the conspiracy count, the court noted references to the making of loans in violation of 12 U.S.C. 371 and 371c which do not define a criminal offense. It ruled, on the authority of *United States* v. *Britton*, 108 U.S. 199 (drawing a distinction between misapplication of funds and maladministration), that "the alleged acts of defendants in violations of these sections do not amount to criminal misapplication of moneys or funds, although they may raise the question of maladministration" (R. 110-112).

On appeal by the government, the Court of Appeals upheld the entire indictment, considering, in addition to the trial court's ground of decision on the substantive counts, petitioners' other arguments addressed to the validity of those counts. With respect to a contention by petitioners that, as to the conspiracy count, the appeal should have been taken to the Supreme Court as involving a construction of the statute on which the indictment was founded, the Court of Appeals found that the district court "in effect held that the single reference to Section 371c of Title 12, United States Code, operated to refute all of the charges of wilful misapplication of moneys, funds and credits." It accordingly con-

strued the holding of the district court "to be in effect procedural, or based on a claimed defect in pleading, rather than upon the construction of any of the statutes upon which the count is founded" (Pet. App. 14a).[1] Having thus found that it had jurisdiction, it ruled that the district court erred in giving the impact it did to the reference to 12 U.S.C. 371c, and found that in totality count 1 sufficiently alleged a conspiracy to violate federal law (Pet. App. 14a-16a). It also upheld the substantive counts against the charge of duplicity and against contentions that they did not state an offense. Judge Rives dissented as to the sufficiency of the pleadings in counts 2-10 and 13-17 (Pet. App. 20a-26a).

ARGUMENT

Petitioners seek to have this Court pass on the validity of the indictment, upheld by the Court of Appeals, before they have been tried. Many of their contentions, although allegedly going to the sufficiency of the pleading, are really an attempt to have a ruling on their version of the facts without a trial. There is thus no occasion for this Court to review the matter at this interlocutory stage. In addition, petitioners make two preliminary contentions which do not concern the sufficiency of the indictment as a pleading. Neither presents an issue of merit.

1. They argue that the Court of Appeals improperly deemed the decision of the district court a ruling on the sufficiency of the indictment as a pleading, with consequent jurisdiction in the Court of Appeals to review that ruling, and that the Court of Appeals

[1] "Pet. App." references are to the appendix to the petition in No. 325.

should have transferred the cause to this Court as involving a construction of the statute. The issue does not, as petitioners argue, present a general question under the Criminal Appeals Act, 18 U.S.C. 3731, such as is before this Court in *United States* v. *Mersky*, No. 31, this Term (involving the general question of whether an appeal from a decision construing a regulation on which the indictment is founded goes to a court of appeals or to this Court). Here, there is no doubt as to the applicable law. Appeal from a decision involving a construction of the statute goes to this Court, from a decision construing the indictment to the court of appeals. *United States* v. *Jones*, 345 U.S. 377. All that was involved here was the interpretation of a somewhat ambiguous opinion by the district court. The Court of Appeals properly deemed that opinion as one dealing with the indictment as a pleading. As the Court of Appeals pointed out, it was a settled construction of the statute, which the district court recognized, that mere maladministration, as distinct from misapplication, is not an offense. *United States* v. *Britton*, 108 U.S. 199. The opinion, therefore, is reasonably interpreted as holding that the indictment did not effectively allege misapplication of funds, *i.e.*, that it was defective as a pleading.

2. The petitioners in No. 325 also raise an issue as to the validity of the indictment on the ground that it was returned by a grand jury in Tampa after grand juries in Miami had failed to indict. The issue is not properly here at this time. Petitioners' motion to dismiss on that ground was overruled by the district court at the same time that the court dismissed the indictment as defective pleading. Petitioners had no right to appeal that ruling before trial. On the

government's appeal, petitioners did not raise this issue as an independent ground for sustaining the judgment but made their contentions as to the grand jury as an incidental part of the argument on duplicity. The Court of Appeals did not rule on this issue. Under these circumstances, there is no occasion for this Court to consider the matter before trial.

There is, in any event, no merit in the contention. Petitioners admit that there was jurisdiction over the crime in Tampa; indeed, the conspiracy count alleges that the conspiracy covered a number of counties in the Southern District of Florida (see R. 6). It is settled that the failure of one grand jury to indict does not prevent resubmission of the case to another grand jury. *United States* v. *Thompson*, 251 U.S. 407, 413-415.

3. As to the validity of the indictment, it may be said in general that petitioners attempt to show that what they did was justified. Most of their attacks on the indictment amount, in substance, to an allegation that the government did not negative possible defenses. Their contentions are for the most part answered by the decision by this Court in *Evans* v. *United States*, 153 U.S. 584, after the decisions in *United States* v. *Britton*, 107 U.S. 655 and 108 U.S. 199, on which petitioners rely. This Court pointed out in *Evans* that the criminality of an act charged to be misapplication of bank funds may depend on whether there was "a deliberate purpose on the part of the defendant to defraud the bank" (153 U.S. at 592). It said at pages 593-594:

> Defendant's entire criticism upon these counts seems to be founded upon the hypothesis that no weight whatever is to be given the words

"knowingly, wilfully, unlawfully, and fraudulently," or the general allegation of an intent to defraud—in short, that these words are mere surplusage. Where, however, the statute uses words which are not absolutely inconsistent with an honest purpose, such as was held by this court in *Britton's case* were the words "wilfully misapplied," the allegation of an intent to defraud becomes material in the highest degree. In fact, the gravamen of the offence consists in the evil design with which the misapplication is made, and a count which should omit the words "wilfully," etc., and "with intent to defraud," would be clearly bad. While it is entirely true that an allegation of fraud is insufficient, either in an indictment or in a bill in equity, without giving the particulars of the fraud, an intent to defraud is only to be gathered by the jury from all the facts and circumstances of the case. There is no greater need of setting out the evidence to prove such intent than there would be of averring in detail the evidence of a *scienter*, or of any other fact material to the offence. * * *

This disposes of petitioners' objections with respect to the sufficiency of the conspiracy count and counts 2-10. As to counts 2-10, not only was the intent to defraud alleged, but the means of defrauding were set forth in considerable detail. The gist of the charge is that the defendants took advantage of their position in the bank to make an inadequately secured loan to a corporation which would use the money to repay Federal Title Insurance Company, a company owned and controlled by the defendants. It was alleged that

this was done without disclosure of the true facts to the bank, without the prior approval of the Board of Directors, and without disclosing that the transaction would inure to the personal benefit of the defendants. This certainly spelled out a charge of misapplication of bank funds within the *Evans* decision. The dissenting opinion below does what the *Evans* case had held should not be done, *i.e.*, treat the allegations of intent to defraud as mere surplusage. Moreover, such allegations as that the loans were at a low rate of interest to borrowers in poor financial condition are allegations of fact. Obviously not all the evidence to support such statements could be set out in the indictment, but the allegations do set forth the essential nature of the scheme which the petitioners are charged to have used to defraud the bank. Also, the conspiracy count amply alleges intent to defraud the bank and sufficiently describes the method of defrauding.[2]

4. As to counts 11 and 12, the argument is that no offense is charged because the person deceived was an examiner of the Home Loan Bank Board, an agency not specifically mentioned in 18 U.S.C. 1006. The statute proscribes false reports "with intent to defraud any such institution or any other company, body politic or corporate, or any individual", and then "or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States." Petitioners argue that the statute should be interpreted as if it read to deceive an agent of "any such" department or agency, meaning only

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[2] To the extent that petitioners attack the conspiracy count on the basis of the allegations of violations of 18 U.S.C. 1006, the issues are covered in the discussion of the substantive counts.

those specifically listed, rather than to deceive an agent of "any department or agency of the United States." The Reviser's Notes, however, completely dispose of this contention. They state:

> The term "of of any department or agency of the United States" was inserted in order to clarify the sweeping provisions against fraudulent acts and to eliminate any possible ambiguity as to scope of section.

The only time the words "department or agency of the United States" are used in the statute in that form is in connection with the phrase at issue here. It is thus evident that the phrase "of department or agency of the United States" was intended to mean "of any department or agency of the United States."

5. Counts 13-17 allege the misapplication of funds of a federal association by granting a loan on the security of real estate on which petitioners knew there was a prior purchase money mortgage held by Federal Title, a corporation which they controlled. Petitioners argue that this does not state an offense under 18 U.S.C. 657 because, under Florida law, an unrecorded purchase money mortgage would not be a first lien against a bona fide lender, and there is an allegation in the indictment that petitioners acted without disclosure to the federal savings and loan association of the existence of the purchase money mortgages. Their argument ignores the fact that the gist of the charge is, not merely giving an improperly secured loan, but misapplication of the funds of the bank for the personal benefit of petitioners with intent to defraud the bank. The fact that improperly secured loans were given is

only part of the charge; it is also alleged that the loans were made in disregard of the inadequate financial condition of the borrower under circumstances in which the risk of loss would fall on the association in short, that the whole transaction was in bad faith. Moreover, even on the purchase money mortgage aspect, it is evident that, since petitioners were officers, directors, and members of the loan committee of the bank, there could well be an issue as to whether the association could be held to knowledge of the purchase money mortgages even though petitioners had not disclosed to the association their awareness of the existence of such mortgages. At the very least, petitioners opened up to the association the possibility of litigation in this matter. The issue of whether the entire transaction was one defrauding the bank, or merely poor management, is an issue for trial. The indictment, as such, clearly and sufficiently charges misapplication of the funds of the bank with intent to defraud.

The petitioner in No. 324 alleges that these counts do not charge an offense because they do not set forth that there was a monetary loss to the bank. The indictment does charge that the bank's funds were used in such a manner that the risk of loss fell on the bank, whereas petitioners had the use and benefit thereof for their personal gain. This would be a defrauding of the bank. *Morrissey* v. *United States*, 67 F. 2d 267, 269 (C.A. 9). The fact that ultimately the bank did not lose the money would not negate the offense if the acts charged were an unlawful misapplication at the time the acts were done. *Rakes* v. *United States*, 169 F. 2d 739, 743 (C.A. 4), certiorari denied, 335 U.S. 826; *United States* v. *Nystrom*, 237 F. 2d 218, 225 (C.A. 3).

6. As to counts 18-21, petitioners argue that the participation provision of 18 U.S.C. 1006 should not be read to apply to federal savings and loan associations although the wording of the present statute, as enacted in the 1948 revision of the Criminal Code, admittedly does cover such institutions.[3] This argument stems from the fact that, prior to 1948, misapplication of funds of savings institutions and related offenses were covered by 12 U.S.C. (1946 ed.) 1467(c). This prohibited (1) embezzlement and misapplication of funds; (2) false entry; and (3) unauthorized issuance or assignments of paper. It did not have a specific prohibition against participation in loans although several of the eleven sections from which 18 U.S.C. 1006 was derived did have such a provision.[4] In consolidating the eleven sections, the prohibition against participation was made applicable to all institutions covered by that section, whether or not the prior legislation had done so. The Reviser's Notes do not mention that fact although they say that "[e]ach revised section condenses and simplifies the constituent provisions without change of substance except as herein indicated." From this fact, petitioners argue that, despite the explicit language of Section 1006, it does not apply to savings and loan associations. As the court below held, however, the language of the statute is too explicit to leave room for interpretation. The decision in *Fourco Glass Co.*

[3] The statute was amended in 1956 (70 Stat. 714) to cover institutions insured by the Federal Savings and Loan Insurance Corporation. The acts here charged occurred before that amendment.

[4] The participation provision was in 7 U.S.C. (1946 ed.) 1026(b) and 1514(c); 12 U.S.C. (1946 ed.) 1138d(c); and 15 U.S.C. (1946 ed.) 616(c).

v. *Transmirra Corp.*, 353 U.S. 222, on which petitioners rely, holds that Revisers' Notes are entitled to weight when the intent of the statute is not clear. Here, there is nothing in the language of Section 1006 which would even suggest that its prohibitions do not apply to all the institutions mentioned in that section.

The attack on the sufficiency of these counts as a pleading is without merit. Each count alleges all the elements of the offense. It defines the position of petitioners as officers of a federal institution; charges that they did participate and indirectly receive a specified sum of money represented by a particular loan described as to amount and borrower; alleges the method of indirect receipt, *i.e.*, through Federal Title; and alleges that this was done with intent to defraud. It thus fully apprises the petitioners of the details of the offenses with which they are charged and protects them from double jeopardy. It is a sufficient pleading under the standard of Rule 7(c) of the Federal Rules of Criminal Procedure and the decisions of this Court. *United States* v. *Debrow*, 346 U.S. 374; *Hagner* v. *United States*, 285 U.S. 427, 431.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1959.

18 U.S.C. (1952 ed.) 656:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * * *

18 U.S.C. (1952 ed.) 657:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance,

credit or savings and loan corporation or association authorized or acting under the laws of the United States, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. (1952 ed.) 1006:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Farm Mortgage Corporation, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under laws of the United States, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly

authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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